85-750 (1)

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

JACK ROSE, Individually, and as Superintendent of the Calloway County Schools, and the Board of Education of Calloway County, Kentucky, Petitioners,

VS.

LINDA LITTLEJOHN, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the denial of employment to a non-tenured school teacher by a public school system, because she was a divorced person, constitutes a violation of her rights of privacy and liberty under the United States Constitution.

(2) Whether the United States Court of Appeals erred when it failed to affirm that portion of the lower court's opinion dismissing Jack Rose, individually, when the District Court found "Plaintiff's evidence in this case fails to establish that Defendant's actions were prompted by impermissible motivations or in disregard of Plaintiff's clearly established rights", and the court could not "impose upon the Defendant the knowledge that his action would violate any constitutional rights of the Plaintiff."

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PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS FOR THE SIXTH DISTRICT.

JACK ROSE, Individually, and as Superintendent of the Calloway County Schools, and the Board of Education of Calloway County, Kentucky, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-titled case on July 16, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit reported _____ Fed. 2d, _____ and is printed in Appendix 1 hereto, infra, page 17-51. The judgment of the United States District Court for the Western District of Kentucky, Paducah Division, is printed in Appendix 2,

hereto, infra, page 52-62. The journal entry of judgment of the United States District Court for the Western District of Kentucky, Paducah Division, is printed in Appendix 3, hereto, infra, page 63.

JURISDICTION

The judgment of the United States Court of Appeals, Appendix 1, infra, page 17-51, was entered on July 16, 1985. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. (1).

STATUTES INVOLVED

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this action, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Sec. 1983

AMENDMENT 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State,

excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any

office, civil or military, under the United States or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the

United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

14th amendment to the U.S. Constitution.

STATEMENT OF CASE

The Plaintiff, Linda Littlejohn, was a non-tenured teacher in the Calloway County School System. She held a teaching certificate that qualified her to teach elementary grades 1-8 in all subjects,

including reading, English, mathematics, social studies, and science. She originally was hired as a substitute teacher and librarian. During the 1980-81 and 1981-82 school years, Littlejohn was employed as a full-time fifth grade teacher. Under Kentucky law, non-tenured teachers are automatically rehired for the following school year unless they receive written notice to the contrary by April 30. Since the Calloway County School System could not definitely determine its hiring needs by April 30 for the next school year, each April, in order to avoid automatic renewal, the Calloway County School System would notify many of the non-tenured teachers that their contracts would not be renewed. During the summer, the superintendent would recommend the appropriate number of teachers for rehire.

In April of 1982, Littlejohn and other non-tenured teachers received written notice that their contracts would not be renewed for the 1982-83 school year. Subsequently, Littlejohn and her husband separated and were divorced in July 1982.

During the summer months of 1982, the Defendant, Jack Rose, superintendent of the Calloway County Schools, began making recommendations for the re-employment of the non-tenured teachers for the 1982-83 school year. Rose did not recommend Littlejohn for rehire and she was not rehired by the Calloway County School System. Principal Allen and school board member Reed testified that Rose told them that his determination was based upon Littlejohn's involvement in divorce proceedings. Because the superintendent

failed to recommend her, Littlejohn was not rehired.

The District Court, at the conclusion of the Plaintiff's case, directed a verdict in favor of the Defendants, finding as a matter of law that the Defendants violated no constitutional rights of the Plaintiff. The Plaintiff prosecuted and appealed to the Sixth Circuit Court of Appeals and the Sixth Circuit Court of Appeals reversed the District Court.

REASONS FOR GRANTING THE WRIT

The Supreme Court of the United States should grant this writ of certiorari and review this case.

The issues involved in this case are of first impression. This author has been unable to locate any decisions of the Supreme Court of the United States which

explicitly treat the particular constitutional question involved in this case. In addition, this author has been unable to locate any decisions of the Court of Appeals which treat the particular issue involved in this case. This case appears to be a case of first impression before the Supreme Court of the United States.

The Sixth Circuit Court of Appeals extends the concept of "right of privacy" beyond the "zones of privacy" described in Palko vs. Connecticut, 302 U.S. 319, 712-713; Roe vs. Wade, 410 U.S. 113, 152-153 (1973); Paul vs. Davis 424 U.S. 693, 712-713 (1976).

There is no "right of privacy" found in any specific guarantee of the Constitution. Paul vs. Davis, supra, 712-713 (1976). The Supreme Court has only recognized "zones of privacy" which

must be limited to those personal rights which can be deemed "fundamental" or implicit in the concept of ordered liberty as described in Palko vs. Connecticut, supra, 325 (1937); Paul vs. Davis, supra, citing Roe vs. Wade, supra, 152-153 (1972).

Littlejohn's case comes within none of the recognized "zones of privacy." Her case does not involve her being prohibited from making decisions concerning procreation as was involved in Roe vs. Wade, supra, and Skinner vs. Oklahoma, 316 U.S. 535, 541-542 (1942). She has not been restricted, regulated, or prohibited marriage; cf. Loving vs. Virginia, 388 U.S. 1, 12 (1967); Zablocki vs. Redhail, 434 U.S. 374, 384-385 (1978). Littlejohn has not been prevented from obtaining a divorce because of being indigent and unable to pay court fees, as was the

Plaintiff in Boddie vs. Connecticut, 401 U.S. 371 (1971). Boddie vs. Connecticut, supra, is further distinguished from Littlejohn's case because Boddie primarily involved the right of access to the courts; cf. Logan vs. Zimmerman Brush Company, 455 U.S. 422, 430 footnote 5 (1982). This case does not involve a regulation of family relationships, child rearing, or education, as was discussed in Prince vs. Massachusetts, 321 U.S. 158, 166 (1944), citing Pierce vs. Society of Sisters, 268 U.S. 510 (1925), Meyer vs. Nebraska, 262 U.S. 390 (1923). Littlejohn's contract was not cut short because of school board regulations concerning pregnancy, as was involved in Cleveland Board of Education vs. LaFleur, 414 U.S. 632 (1974). She makes no claim that the non-renewal of her contract was a reprisal for the exercise of freedom of

speech. cf. Keyishian vs. Board of Regents, 385 U.S. 589 (1967); or for political beliefs that had nothing to do with her job, Branti vs. Finkel, 445 U.S. 507, 512-513 (1980).

The martial status cases that the Sixth Circuit Court of Appeals relies upon to support their decision, that Littlejohn's getting a divorce has constitutional protection and therefore cannot be the basis for refusing to employ her, are Loving vs. Virginia and Zablocki vs. Redhail, supra. The marital status cases that the Sixth Circuit Court of Appeals relies upon to support their decision are not only not supported by the rationale of those decisions but are totally in conflict with the rationale of those decisions. Both Loving vs. Virginia, supra, and Zablocki vs. Redhail, supra, recognize that marriage, not

divorce, is one of the basic civil rights of man, fundamental to our very existence and survival. It is clear that divorce does not fit this rationale but is in conflict with the rationale, and, therefore, those decisions are not applicable to this case.

Littlejohn's claim is far afield from the line of cases cited above. Not being rehired by the Board of Education, based upon Dr. Rose's failure to recommend her for a contract because of her being a divorced person, can hardly be said to infringe upon personal privacy, which is "fundamental" or implicit in the concept of ordered liberty, particularly when considered in light of her simply not being rehired in one job and remaining as free as before to seek another.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX 1

Recommended for full text publication

See, Sixth Circuit Rule 24

No. 84-5063

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Linda Littlejohn,

Plaintiff-Appellant,

vs.) On Appeal from
Jack Rose, Individually) the United
and as Superintendent) States District
of the Calloway County) Court for the
Schools; and the Board) We tern Dis-
of Education of Callo-) trict of
way County, Kentucky,) Kentucky.
)
Defendants-)
Appellees.)

Decided and Filed July 16, 1985

Before: Keith, Jones and Krupansky, Circuit Judges.

Keith, Circuit Judge. This is an appeal from a judgment by the United States District Court for the Western District of Kentucky granting appellees' motion for a directed verdict in this suit alleging violation of appellant's constitutional rights of privacy and liberty in contravention of 42 U.S.C.

1983 (1). For the reasons stated below, we reverse the ruling of the district court.

(1) This statute, 42 U.S.C. 1983, provides as follows:

1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FACTS

Appellant Linda Littlejohn was a non-tenured teacher in the Calloway County

school system. Appellant was originally hired as a substitute teacher and librarian, and held a teaching certificate that qualified her to teach all subjects in elementary grades 1 through 8. In the 1980-81 and 1981-82 school years, Littlejohn was employed as a full-time fifth grade teacher.

According to her principal, Bobby Allen, Littlejohn was an "excellent" teacher. She had good evaluations for the two years she taught. In addition to her teaching duties, she served on behalf of her school as chairperson for the Southern Association Accreditation and Kentucky Accreditation programs. According to Allen, these activities required "a lot of perseverance and a lot of ability to get along with others."

Under Kentucky law, non-tenured teachers are automatically rehired for the

following school year unless they receive written notice to the contrary by April 30. The Calloway County School System could not definitely determine its hiring needs for the next school year by April 30. Therefore, in order to avoid automatic renewal, each April the Calloway County school system would notify the non-tenured teachers that their contracts would not be renewed. During the summer, the superintendent would recommend the appropriate number of non-tenured teachers for rehire.

In April 1982, Littlejohn and other non-tenured teachers received written notice that their contracts would not be renewed for the 1982-83 school year. Subsequently, Littlejohn and her husband of nine years separated, and were eventually divorced in July 1982.

During the summer of 1982, defendant Jack Rose, Superintendent of the Calloway County Schools, began making recommendations for the reemployment of the non-tenured teachers for the 1982-83 school year. Despite Principal Allen's decision to strongly recommend Littlejohn for rehire, Rose determined not to do so. Allen and School Board member Charles Reed testified that Rose told them his determination was based upon Littlejohn's involvement in divorce proceedings. Because Rose failed to recommend her, Littlejohn was not rehired. Appellant subsequently initiated this action in federal district court.

Appellant contended that the failure of the superintendent to recommend the renewal of her teaching contract was based upon the status of her marital relationship, specifically, her impending

divorce, in violation of her constitutional rights of privacy and liberty. The suit, based on 42 U.S.C. 1983, sought reinstatement, back pay, and other damages and relief.

The district court acknowledged that "[t]here was evidence at the trial that the reason given by defendant for plaintiff's non-renewal was the fact that she was involved in the dissolution of her marriage." Littlejohn v. Rose, No. C820217-P(B), slip op. at 2 (W.D.Ky. Dec. 12, 1983). Nevertheless, the court directed a verdict in favor of the defendants. The court gave two reasons for its ruling. First, it said that "[p]laintiff cannot establish any fundamental right to employment by the Board, and, absent this right . . . plaintiff has failed to sustain her burden." Id. at 3. Second, the court

ruled that even assuming Littlejohn stated a viable constitutional claim, defendant Rose was entitled to qualified immunity because Littlejohn failed "to establish that defendant's actions were prompted by impermissible motivation or in disregard of plaintiff's clearly established rights." Id. The district court ruled that each reason alone would justify dismissal.

DISCUSSION

A.

Decisions Regarding Appellant's Employment Based on Marital Status Violate Her Constitutional Right to Privacy:

Ms. Littlejohn's tenure with the school system was too short to establish a property right in the absence of a contract, thus only the infringement on appellant's constitutional right to

privacy will be addressed. Decisions of the Supreme Court have firmly established that "matters relating to marriage [and] family relationships" involve privacy rights that are constitutionally protected against unwarranted governmental interference. E.g., Roe v. Wade, 410 U.S. 113, 152-53 (1973). The Court has "routinely categorized [these matters] as among the personal decisions protected by the right to privacy [and, in addition] has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Zablocki v. Redhail, 434 U.S. 374, 384-85 (1978) (citing Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40 (1974); see also Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Carey v. Population

Services international, 431 U.S. 678, 684-85 (1971). The Supreme Court has established broad protection for matters relating to the marital relationship including the availability of due process in seeking adjustments to the marital relationship. Boddie v. Connecticut, 401 U.S. 371 (1971). Given the "associational interests that surround the establishment and dissolution of [the marital] relationship", such "adjustments" as divorce and separation are naturally included within the umbrella of protection accorded to the right of privacy. See Zablocki at 385; U.S. v. Kras, 409 U.S. 434, 444 (1975). In Carey v. Population Services International, 431 U.S. at 684-85, the Supreme Court clearly held that decisions regarding marital status are protected by the constitutional right to privacy:

Although "[t]he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." Roe v. Wade, 410 U.S. 113, 152 (1973). This right of personal privacy includes "the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977). While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to

> marriage," Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541-542 (1942); contraception, Eisenstadt v. Baird, 405 U.S. at 453-454; ... and family relationships. Prince v. Massachusetts, 321 U.S. 158, 166 (1944)...

The district court acknowledged that matters relating to the marital relationship are entitled to special constitutional protection. Littlejohn v. Rose, No. C82-0217-P (B), slip op at 3 (W.D. Ky. Dec. 12, 1983). Moreover, the Court observed that "[w]ere this an instance in which plaintiff had been discharged from her employment by reason of her domestic difficulties [the court] would have no hesitancy in holding that plaintiff had articulated a justiciable claim". Id.

The court also stated that Littlejohn was not discharged from employment during the term of her contract, but rather her one year employment contract was not renewed after it had expired, and thus plaintiff had no constitutionally protected property right to employment. For this reason the district court concluded that Littlejohn did "not establish a fundamental right to employment by the Board," and therefore she did not articulate a viable constitutional claim. Id. We do not agree.

The fundamental right violated here is Ms. Littlejohn's right to privacy regarding her marital status. After analyzing Supreme Court rulings, the district court concluded that the right to privacy is only recognized when certain fundamental rights such as liberty or property rights are also affected. Littlejohn v. Rose, No. C82-0217-P (B), slip opinion at 3 (W.D. Ky.

Dec. 12, 1983) (citing Paul v. Davis, 424 U.S. 693, 713 (1976)); Roe v. Wade, 410 U.S. at 152-53 (1973). The district court is incorrect. Upon closer examination it is clear that the ruling in Paul v. Davis did not constrain the holding in Roe v. Wade. Roe clearly established the existence of a constitutionally protected right to privacy which includes matters relating to procreation and marriage. As the Court stated in Paul:

> In Roe the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are "fundamental" or "implicit in the concept of ordered liberty" as described in Palko v. Connecticut, 302 U.S. 319, 325 (1937). The activities detailed as being within this definition were ones very

> different from that for which respondent claims constitutional protection - matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct.

424 U.S. at 713.

By focusing on whether Littlejohn had any right to employment, the district court missed the key inquiry of this case: Whether the school board or Superintendent Rose could, without sufficient justification, deny public employment because of involvement in constitutionally protected activity. If the district court had so determined it would not have issued a directed verdict in appellees' favor.

The Supreme Court has generally rejected the theory that a government benefit, such as public employment, to which employees have no contractual right, may be denied for any reason. Keyishian v. Board of Regents, 385 U.S. 589, 605 (1967). In 1972 the Court observed that its decisions:

> For at least a quarter century [have] made it clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests...For if the government could deny a benefit to a person because of his

> constitutionally protected [activities] his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which it could not command directly." [Citation omitted]. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972). In Perry, the Court noted that it had applied this principle to a number of situations most often to those involving denials of public employment regardless of the public employee's contractual or other claim to a job. Id. (citations omitted).

In the case at bar, allowing the board to refuse to renew a teaching contract because a teacher is undergoing divorce could possibly subject untenured teachers to painful consequences from the state

board due to their marriage decisions. It is clear from the Supreme Court's analysis in Perry that a person's involvement in activity shielded by the constitutionally protected rights of privacy and liberty constitutes an impermissible reason for denying employment. Even prior to Perry, this Circuit stated "it is no longer open to debate that [a non-tenured teacher] would be entitled to relief" if a Board of Education had based its refusal to rehire on a constitutionally impermissible reason. Orr v. Trinter, 444 F. 2d 128, 134 (6th Cir. 1971). Littlejohn's claim falls within the principles set forth above. She has presented evidence that she was denied employment because of her impending divorce.

The district court does not detail the evidence presented at trial. However, since the propriety of a ruling on a motion

for directed verdict is the subject of review, this Court is free to review the evidence.(2) Coffy v. Multi-County Narcotics Bureau, 600 F. 2d 570, 579 (6th Cir. 1969); Southern Railway Co v. Miller,

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(2) Federal Rule of Civil Procedure 50, which governs the granting of motions for a directed verdict, reads in pertinent part as follows:

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

> (a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if

the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts.....

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with

his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

285 F. 2d 202, 206 (6th Cir. 1960). In a motion for directed verdict, the initial

determination is whether the evidence is sufficient to create an issue of fact for the jury. This is solely a question of law to be determined by the trial court and subject to full review by this Court. O'Neill v. Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975); 9 C. Wright & A. Miller, Federal Practice and Procedure, 2521 at 537, 2524 at 541 (1971). The standard for determining whether a directed verdict was properly granted is very strict: Viewing the evidence in the light most favorable to the party against whom the motion is made, a directed verdict is proper if reasonable minds could only come to a conclusion against the non-movant. In coming to this conclusion neither the credibility or weight of the evidence should be considered. Patrick v. South Central Bell Telephone Co., 641 F.2d 1192, 1197 (6th Cir. 1980); Coffy v. Multi-County Narcotics

Bureau, 600 F.2d 570, 579 (6th Cir. 1979); Standard Alliance Industries v. Black Clawson Co., 587 F.2d 813, 823 (6th Cir. 1978); Morelfock v. NCR Corp., 586 F.2d 1096, 1105 (6th Cir. 1978); O'Neill v. Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975).

In the instant case it is clear that the district court's grant of a directed verdict was incorrect. Viewing the record before us, it is clearly possible for a reasonable jury to find in favor of Ms. Littlejohn. The testimony below includes statements by appellant's superiors adequate to support the theory that her divorce was the motivating factor in the superintendent's refusal to recommend her for rehire. In direct testimony, Ms. Littlejohn's principal stated his positive opinion of her skills, then went on to

detail a conversation with Suprintendent Rose regarding appellant's reappointment:

> Q. During the summer of 1982, did you have an occasion to have a conference with Superintendent Jack Rose concerning the employment of various teachers, including Linda Littlejohn?
>
> A. Yes, I did.
>
> Q. How did that come about, if you will, please?
>
> A. I'm not for sure how the conference came about. I assume I was probably called in to the superintendent's office to discuss it with Doctor Rose.
>
> Q. And did Linda Littlejohn come up?
>
> A. Yes, she did.

Q. Can you recall how she came up?

A. Well, I think we were discussing personnel possibilities of openings at the school. At East Calloway we had, I think, two ladies in the first grade that was going to ask for a leave of absence due to pregnancy. We had a lady that was going to ask for an additional year's leave in second grade. And, of course, we had a gifted and talented position we had not filled at that point. We were discussing all those positions.

Q. Was it your desire and did you make any type of recommendation concerning Linda Littlejohn for her following year's employment?

A. Yes, I did. I recommended her back.

Q. All right. And did you have any conversation with Doctor Rose about that recommendation?

A. Yes. As I recall, Doctor Rose mentioned to me that he had gotten some phone calls, something about some lady in the community had called that was concerned about the divorcees. And we did have a couple or three divorcees in the East school. I don't think that that's uncommon, but we did have. And she expressed some concern about it as well.

Q. All right. And what was his comment to you about the divorce?

A. Well, as nearly as I can recall now--this has been two years ago, but as near as I can recall, I asked him what the reason was for Linda's not

being recommended back, and he stated to me that it was the divorce and the rumors of, you know, that was being circulated about the divorce, or whatever, or the phone call, I suppose, and the image that it would present in the community with the Eastwood Christian School being located in our community and we had some students from all three schools that had filtered over into the Eastwood Christian School. And that was of some concern to Dr. Rose, I think.

Q. All right. If you would, retrace for the jury so they can clearly understand how that conversation came about.

A. Well, we were talking about filling the position, and he just

informed me - and it kind of caught me as a surprise - that he wasn't going to recommend Linda back. And I just said, "Well, why not?" And he stated to me then, "Because of the divorce, the phone call, and the image that we would present in the community."

Is that what you're asking?

Q. Yes, sir; yes sir. You had not brought up the topic of divorce prior to his mentioning it, is that true?

A. No, sir, not at that time.

Q. Were there any reasons given to you in response to your question why?

A. No, sir.

Jt. App. at 24-26.

In our view, Mr. Allen's testimony was sufficient to create an issue of fact for

the jury. Further, under the Supreme Court's analysis in Perry, it is clear that the district court also mistakenly focused on whether Littlejohn had a right to employment, when the material question was whether or not the refusal to rehire her was based on her constitutionally protected decision to seek a divorce. Accordingly, we reverse the district court's grant of a directed verdict and remand the case for a new trial not inconsistent with the reasoning herein. (3)

---

(3) In responding to appelles' motion for a directed verdict, it would have been better for the district court judge to submit the case to the jury. Had the jury returned a verdict for the appellees, the district court could have entered a judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b) if it

felt that Ms. Littlejohn had not made a case. On appeal, this Court could then dispose of the case without remanding for a totally new trial. See Campbell v. Oliva, 424 F.2d 1244, 1251-52 (6th Cir. 1970); 9C. Wright & A. Miller, Federal Practice and Procedure 2533 at 586.

B.

The Qualified Immunity Defense Did Not Entitle Defendant Rose to Dismissal of the Complaint Against Him:

The district court also ruled that assuming Littlejohn's claim was viable, defendant Rose's right to qualified immunity in his individual capacity nevertheless justified the dismissal of the complaint in its entirety. In Wood v. Strickland, 420 U.S. 308 (1975), the Supreme Court confronted the question of whether a school board member was immune

from personal liability for damages when he had acted unconstitutionally in the suspension of a student. The qualified immunity that the Court established in Wood - and its progeny - insulated government officials from liability only in their individual capacities and only for money damages. It has no effect on their liability in their official capacities since actions against parties in their official capacities are, essentially, actions against the entities for which the officers are agents, Brandon v. Holt, 105 S. C. 873 (1985); Monell v. Department of Social Services, 436 U.S. 658, 690 n.55 (1978).

Although the district court cited Wood v. Strickland, 420 U.S. 308 (1975) as a basis for its decision, the opinion itself suggests that the district court applied the objective test of Harlow v. Fitzgerald,

457 U.S. 800, 815-819 (1982) as a basis for its decision that the defendant, Dr. Rose, individually, is entitled to the defense of qualified immunity. The district court found that "plaintiff's evidence in this case fails to establish that defendant's actions were prompted by impermissible motivation or in disregard of plaintiff's clearly established rights;" and that the court could not "impose upon the defendant the knowledge that his actions would violate any constitutional rights of plaintiff." Littlejohn v. Rose, No. C82-0217-P(B), Slip opinion at 5 (W.D. Ky. Dec. 12, 1983). The district court's holding was in complete conformity with the objective standard announced in Harlow v. Fitzgerals: "we therefore hold that government officials performing discretionary functions generally are shielded from liabiliity for civil damages

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818.

Regardless of the standard applied, the qualified immunity defense only protects the superintendent in his individual capacity from money damages, not from other forms of relief sought such as reinstatement. Id. Further, despite the good faith intentions of the officers through which it acts, a local government entity cannot assert a good faith immunity defense in any circumstances. Brandon v. Holt, 105 S.C. 873 (1985); Owen v. City of Independence, 445 U.S. 622 (1980). Accordingly, the availability of qualified immunity that would enable an individual defendant to escape individual liability for money damages would not warrant the

dismissal of claims against that defendant in his official capacity or against a governmental entity.

The complaint in this case was filed against Rose "Individually and as Superintendent of the Calloway County Schools," and the "Board of Education of Calloway County, Kentucky." In addition to money damages, appellant seeks, among other things, an injunction reinstating her to a position as a classroom teacher in the Calloway County School System. Since, at most, the resolution of the qualified immunity issue would settle only defendant Rose's liability as an individual for money damages, these liability issues remain unresolved. Thus the dismissal of the entire case on the basis of defendant Rose's entitlement to qualified immunity was erroneous. Rose is only entitled to such immunity in his individual liability

for money damages, not in his official capacity as the superintendent of schools. Thus the qualified immunity defense was an insufficient basis for a grant of summary judgment. Accordingly we also reverse the district court opinion on the grounds that appellees are not entitled to qualified immunity.

APPENDIX 2

United States District Court

FOR THE

WESTERN DISTRICT OF KENTUCKY

AT PADUCAH

No. C82-0217-P(B)

LINDA LITTLEJOHN
Plaintiff,

vs.

JACK ROSE, Individually and as Superintendent of the Calloway County Schools, and the BOARD OF EDUCATION OF CALLOWAY COUNTY, KENTUCKY
Defendants

MEMORANDUM

This civil rights action, Title 42 U.S.C. Section 1983, came on for trial before the Court with a jury on December 5, 1983. At the conclusion of plaintiff's evidence and after hearing the arguments of counsel, the Court granted defendants' motion for a directed verdict.

Taken in the light most favorable to plaintiff, the evidence established that plaintiff was a nontenured teacher in the Calloway County school system. She was originally hired as a substitute teacher and librarian. In the 1980-81 and 1981-82 school years, plaintiff was a full-time fifth grade teacher.

As was its practice, prior to April 30, 1982, the Board of Education notified all non-tenured teachers that their contracts would not be renewed. The purpose of this action was to avoid the automatic renewal of the limited contracts of all non-tenured teachers. KRS 161.750. During the summer of each year, when the fall enrollment and teaching personnel requirements could be determined, sufficient non-tenured teachers were recommended for employment. These recommendations were made by the defendant,

Superintendent Rose. Although the Board had the right to reject the Superintendent's recommendations it did not have the right to order the hiring of any specific teacher.

Prior to April 30, 1982, plaintiff was notified that her limited contract would not be renewed. In the summer of 1982, defendant Rose recommended the hiring of several non-tenured teachers for the 1982-83 school year. Plaintiff was not recommended and a rift developed on the Board. At first a majority of the Board refused to approve any of defendent's recommendations unless and until plaintiff was included on the list of those recommended. When it became apparent that there would be insuficient teachers to staff the schools when they opened, one or two of the Board members withdrew their opposition to defendant Rose's

recommendations and a sufficient number of teachers were hired to staff the schools.

There was evidence at the trial that the reason given by defendant for plaintiff's non-renewal was the fact that she was involved in dissolution of her marriage.

I

At the outset it should be noted that plaintiff claims no property or liberty interest in the renewal of her contract. The thrust of her complaint is that she has a constitutional right to privacy which has been invaded by defendant Rose.

The court is aware of the language in Paul v. Davis, 424 U.S. 693, 96 5.Ct. 1155 (1976):

> "In Roev. Wade, 410 U.S., 113, 152-153, 93 S.Ct. 705, 726, 35 L.Ed. 2d 147, 176-178 (1973) the Court pointed out that the personal rights

found in this guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty' as described in Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288, 292 (1937). The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protection-matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States power to substantively regulate conduct." 424 U.S. at 713, 969 S.Ct. at 1166.

Were this an instance in which plaintiff had been discharged from her

employment by reason of her domestic difficulties, we would have no hesitancy in holding that plaintiff had articulated a justiciable claim. As the Roe court noted, however, there must be certain fundamental rights involved. Plaintiff cannot establish any fundamental right, this Court concludes that plaintiff had failed to sustain her burden.

II

Assuming arguendo the viability of plaintiff's claim, we look to defendant's assertion of a qualified immunity.

Although at an unreported pre-trial conference plaintiff indicated that there would be evidence that defendant Rose was advised by counsel that his decision would be subject to constitutional challenge no such evidence was introduced at trial.

In Wood v. Strickland, 420 U.S. 306, 95 S.Ct. 992 (1975), the court treated the

queston of good faith in establishing a qualified immunity:

> "The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an 'objective' versus a 'subjective' test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical

remedial language of [Section] 1983 in a case in which his action violated a student's consitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would

deny much of the promise of [Section] 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under [Section] 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." That is not to say that school board members are 'charged with predicting the future course of constitutional law.' Pierson v. Ray, 386 U.S., at 557, 87 S.Ct., at 1219. A school board member has acted with such an

impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." 420 U.S. at 321, 95 S.Ct. at 1000.

Plaintiff's evidence in this case fails to establish that defendant's actions were prompted by impermissible motivation or in disregard of plaintiff's clearly established rights. The Court cannot impose upon defendant the knowledge that his actions would violate any contitutional rights of plaintiff.

CONCLUSION

The Court concludes that plaintiff's complaint must be dismissed and an

appropriate Judgment has been entered this 7th day of December 1983.

THOMAS A BALLANTINE, JR
United States District Judge

Copies to counsel

United States District Court

FOR THE

WESTERN DISTRICT OF KENTUCKY

AT PADUCAH

No. C82-0217-P(B)

LINDA LITTLEJOHN)
Plaintiff,)
)
vs.)
)
JACK ROSE, Individually and as)
Superintendent of the Calloway)
County Schools, and the BOARD OF)
EDUCATION OF CALLOWAY COUNTY,)
KENTUCKY)
)
Defendants)

JUDGMENT

For the reasons set forth in the memorandum filed this date, IT IS ORDERED that the complaint of the plaintiff, Linda Littlejohn, against the defendants, Jack Rose, individually and as Superintendent of the Calloway County Schools and the Board of Education of Calloway County, Kentucky, be and it hereby is dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable order.

This 7th day of December, 1983.

THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to counsel

CERTIFICATE OF COUNSEL

I, the undersigned, hereby certify that I have timely filed the foregoing Petition for Writ of Certiorari by depositing in the United States Post Office, with first-class postage prepaid, the original and 40 copies of the same pursuant to SCT 28.2 and SCT 19.3 and properly addressed to:

Clerk of the Supreme Court of the
United States
United States Supreme Court Building
First Street, NE
Washington, D. C. 20543

I, the undersigned, hereby further certify that I have caused a true and accurate copy of the foregoing Petition for Writ of Certiorari to be served upon the Respondent pursuant to SCT 28.3 by depositing in the United States Post Office, with first-class postage prepaid, 3 copies of the same to each of the following on this the 30th day of October, 1985:

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Supreme Court, U.S.
FILED
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CLERK

No. 85-750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JACK ROSE, ETC., *et al.*,
Petitioners,

v.

LINDA LITTLEJOHN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

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JACK ROSE, ETC., *et al.*,

Petitioners,

v.

LINDA LITTLEJOHN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

For the reasons stated herein, petitioners' request for a writ of certiorari should be denied.

STATEMENT OF THE CASE

Respondent Linda Littlejohn was employed during the 1980-81 and 1981-82 school years as a non-tenured fifth-grade teacher in the Calloway County, Kentucky School District. Littlejohn and her husband separated in May 1982 and were divorced in July of that year. While Littlejohn's divorce was pending, the Calloway County school system determined not to renew her teaching contract for the 1982-83 school year. Littlejohn brought suit, claiming that this failure to renew her contract was

unconstitutionally predicated on the dissolution of her marriage.

At the conclusion of plaintiff's case, the district court granted defendants' motion for a directed verdict. The court acknowledged that "[t]here was evidence at the trial that the reason given by defendant for plaintiff's nonrenewal was the fact she was involved in the dissolution of her marriage." Petition App. at 55. Recognizing that matters relating to the marital relationship are entitled to special constitutional protection, the court observed that "[w]ere this an instance in which plaintiff had been *discharged* from her employment by reason of her domestic difficulties, [it] would have *no hesitancy* in holding that plaintiff had articulated a justiciable claim." Pet. App. at 56-7 (emphasis added). Since Littlejohn was not discharged during the term of her 1981-82 school year contract (this one-year employment contract, rather, was *not renewed* after it had expired), the court concluded that there were no "fundamental rights involved" in this case. Pet. App. at 57. And because "[p]laintiff cannot establish any fundamental right to *employment* by the Board," (R 27, p. 3) (emphasis added),[1] the court held that she did not articulate a viable claim.[2]

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[1] The version of the district court's opinion that appears in the Petition Appendix is incomplete at page 57, line 7, in that it omits the language quoted above; specifically, it states: "Plaintiff cannot establish any fundamental right, this court concludes that plaintiff had failed to sustain her burden (sic)." The full line should read:

> Plaintiff cannot establish any fundamental right to employment by the Board, and, absent this right, this Court concludes that plaintiff has failed to sustain her burden.

R 27, p. 3.

[2] As a second, alternative reason that it said alone would justify dismissal of the case, the district court ruled that even assuming Littlejohn stated a viable constitutional claim, defendant Rose, the superintendent, was entitled to qualified immunity. Pet. App. at 61.

The Sixth Circuit reversed. It held that a right to employment is not a prerequisite to a claim that the state unconstitutionally denied employment because of an employee's involvement in protected activity—here, the dissolution of a marriage.[3]

ARGUMENT

This Court has clearly established the principles that are necessary to resolve this case, and the Sixth Circuit correctly applied those principles in reversing the judgment of the district court. This case poses no special considerations warranting plenary review by this Court.

This Court has "routinely categorized [matters relating to marital and family relationships] as among the personal decisions protected by the right to privacy [and, in addition], 'has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" *Zablocki v. Redhail*, 434 U.S. 374, 384-85 (1978), citing *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974). The Court has made clear that the protection accorded to mat-

---

[3] In addition, although insufficiency of the evidence was not the basis for the directed verdict, the Sixth Circuit held that the evidence was sufficient to permit a jury to conclude that Littlejohn's involvement in divorce proceedings was the motivating factor in the superintendent's refusal to recommend her for rehire.

With respect to the immunity issue, *see* note 2, *supra*, the court held that the dismissal of the case on the basis of the qualified immunity defense asserted by the superintendent was erroneous.

Petitioners assert in their second "Question Presented" that the court of appeals should have affirmed the district court's dismissal of Littlejohn's claim against the superintendent, in his individual capacity. But the district court's judgment dismissed Littlejohn's case in its entirety, not simply her claim against the superintendent in his individual capacity, and the Sixth Circuit correctly reversed this judgment. In any event, petitioners fail to offer any reason why such an issue is worthy of review, and we see none.

ters relating to the marital relationship extends to the "adjustment of [that] fundamental human relationship," *Boddie v. Connecticut*, 401 U.S. 371 (1971), given the " 'associational interests that surround the establishment and *dissolution* of that relationship,' " *Zablocki*, *supra* at 385-86 n.10, citing *U.S. v. Kras*, 409 U.S. 434, 444 (1973) (emphasis added).[4]

Further, this Court has "uniformly rejected' the theory that a government benefit, such as public employment, to which employees have no contractual right, may be denied

---

[4] Petitioners suggest, notwithstanding these pronouncements, that the dissolution of marriage somehow is not within the sphere of constitutionally protected privacy or liberty interests. Petitioners misconceive the nature of the privacy and liberty interest at issue here. This Court has made clear that the right "to enter into and maintain certain intimate human relationships," such as marriage, is an aspect of the "freedom of association." *Roberts v. United States Jaycees*, 104 S.Ct. 3244, 3249 (1984). And the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts, supra*, 104 S.Ct. at 3252. Consistent with this principle, as this Court has recognized, the constitutional protection accorded the marital relationship must extend to the dissolution of marriage as well as to the creation of marriage in order to ensure that marriage remains a consensual association, rather than a union that is the product of state compulsion.

Petitioners also state that "[n]ot being rehired by the Board . . . because of her being a divorced person, can hardly be said to infringe upon personal privacy . . . particularly when considered in light of her simply [not] being rehired in one job and remaining as free as before to seek another" Pet. at 15. They appear by this statement to confuse the privacy/liberty interest at stake here with the separate liberty interest that may be implicated by governmental action defaming a person in the course of declining to rehire him. *See, e.g., Paul v. Davis*, 424 U.S. 693, 710 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). The latter liberty interest—which requires only that the government afford *procedural* safeguards before taking action on the basis of disparaging or stigmatizing charges, *id.*—is not at issue here. This case involves the denial of employment for a reason that is constitutionally impermissible. Thus, even assuming Littlejohn remained free to seek another job, this is not relevant to the merits of her claim.

for reasons that infringe upon constitutionally protected activity. *Keyishian v. Board of Regents*, 385 U.S. 589, 605 (1967). As the Court observed in 1972, its decisions

> [f]or at least a quarter-century [have] made . . . clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes a constitutionally protected interest. . . . For if the government could deny a benefit to a person because of his constitutionally protected [activities] his exercise of those freedoms would in effect be penalized. . . . This would allow the government to 'produce a result which it could not command directly' . . . . Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citation omitted). The principle that a benefit cannot be denied because of a person's involvement in constitutionally protected activity has been applied "most often . . . to denials of public employment . . . regardless of the public employee's contractual or other claim to a job." *Id.* (citations omitted).

Littlejohn's claim falls squarely within the principles set forth above. She stated and substantiated her claim that she was denied employment on a constitutionally impermissible basis—because of her involvement in the dissolution of her marital relationship.[5] The District Court's dismissal of her claim based on the lack of a fundamental

---

[5] Because this case involves the marital relationship, to which this Court already has accorded special constitutional protection, the resolution of *Bowers v. Hardwick*, 85-140, now pending before this Court, should not affect the outcome here. *Bowers* concerns the extension of this Court's privacy decisions to relationships or conduct (homosexual activity) that has not been expressly accorded protection under such decisions.

right to *employment* was therefore erroneous, and the Sixth Circuit's reversal was entirely correct.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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